IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
SAMUEL STEVEN ABBOUD,	)	
	)	CASE NO. BK02-80679
Debtor(s).	)	
	)	A02-8056
JIMMY'S PLUMBING, INC., and SUBURBAN ELECTRIC, INC.,	)	
	)	
Plaintiffs,	)	CH. 7
	)	
vs.	)	
	)	
SAMUEL STEVEN ABBOUD,	)	
	)	
Defendant.	)	

MEMORANDUM

Trial was held in Omaha, Nebraska, on January 27, 2003, on the complaint to determine dischargeability. Howard Duncan appeared for the debtor, and Todd Weidemann appeared for the plaintiffs. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

The debts are dischargeable.

I. Background

The debtor was the president of Majestic Construction & Engineering, Inc., d/b/a Majestic Homes, which acted as a general contractor on new residential construction. He hired the plaintiffs, Jimmy's Plumbing, Inc., and Suburban Electric, Inc., as subcontractors on two projects. The plaintiffs have not been paid for their work, and they contend that the amounts owed to them should be excepted from the debtor's discharge under 11 U.S.C. § 523(a)(2)(A) because of fraudulent conduct by the debtor, under 11 U.S.C. § 523(a)(4) because of fraud or defalcation while acting in a fiduciary capacity, and under 11 U.S.C. § 523(a)(6) because of willful and malicious injury by the debtor.

The plaintiffs worked for Majestic on a house in the Western Oaks subdivision and on a house in the Hawthorne subdivision, both in Omaha, Nebraska. In the summer of 2001, Majestic sold both homes, and in doing so filed lien affidavits stating that the properties were free and clear of all liens, encumbrances, and claims, and that no labor or material bills for the properties remained unpaid. After the houses sold, the plaintiffs filed construction liens on the properties.

II. Law & Discussion

A. Liability of corporate officer

It is clearly established, in Nebraska and elsewhere, that a director or officer of a corporation is individually liable for fraudulent acts or false representations of his own or in which he participates, even though his actions may be in furtherance of the corporate business. Huffman v. Poore, 569 N.W.2d 549, 558 (Neb. Ct. App. 1997) (citing 18B Am. Jur. 2d *Corporations* § 1882 at 730-32 (1985)).

The corporate veil may be pierced to hold a shareholder liable when the shareholder has used the corporation to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another. Huffman, 569 N.W.2d at 557. However, when a tort action is brought against an officer or director, there is no need to pierce the corporate veil, and liability will be imposed if the elements of the tort are satisfied. Id. See also discussion in Wolf v. Walt, 530 N.W.2d 890, 896-98 (Neb. 1996).

Here, the debtor testified that he is the sole shareholder of Majestic Construction & Engineering. The documents admitted at trial that relate to the transactions at issue indicate that the debtor executed most or all of them in his capacity as president of one or the other Majestic entities. There is also evidence that the debtor paid both plaintiff creditors with checks drawn on a personal account in the name of him and his wife, as well as with checks drawn on a Majestic account. Moreover, the debtor listed his business debts, including the debts at issue in this adversary proceeding, in his personal bankruptcy schedules.

The plaintiffs in this case allege tortious conduct and fraudulent activities and representations by the debtor in the conduct of his general contracting business. Under Nebraska case

law, the corporate entity cannot shield the debtor from the plaintiffs' claims.

B. § 523(a)(2)(A)

For a debt to be declared nondischargeable under § 523(a)(2)(A) for fraud, the creditor must show, by a preponderance of the evidence, that: (1) the debtor made a representation; (2) the representation was made at a time when the debtor knew the representation was false; (3) the debtor made the representation deliberately and intentionally with the intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on such representation; and (5) the creditor sustained a loss as the proximate result of the representation having been made. Universal Bank, N.A. v. Grause (In re Grause), 245 B.R. 95, 99 (B.A.P. 8th Cir. 2000) (citing Thul v. Ophaug (In re Ophaug), 827 F.2d 340, 342 n.1 (8th Cir. 1987), as supplemented by Field v. Mans, 516 U.S. 59 (1995)). In Field v. Mans, the Supreme Court held that § 523(a)(2)(A) requires justifiable reliance, in which "[j]ustification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than the application of a community standard of conduct to all cases." Id. at 71 (citing the Restatement (Second) of Torts § 545A cmt. b (1976)).

The focus of a § 523(a)(2)(A) determination is whether the debtor ever intended to pay the obligation.

> To qualify as a false representation or false pretense under § 523(a)(2)(A), the statement must relate to a present or past fact. Shea v. Shea (In re Shea), 221 B.R. 491, 496 (Bankr. D. Minn. 1998). "[A debtor's] promise . . . related to [a] future action [which does] not purport to depict current or past fact . . . therefore cannot be defined as a false representation or a false pretense." Id. (quoting Bank of Louisiana v. Bercier (In re Bercier), 934 F.2d 689, 692 (5th Cir. 1991)). A debtor's promise related to a future act can constitute actionable fraud, however, where the debtor possesses no intent to perform the act at the time the debtor's promise is made. Universal Pontiac-Buick-GMC Truck, Inc. v. Routson (In re Routson), 160 B.R. 595, 609 (Bankr. D. Minn. 1993).

Gadtke v. Bren (In re Bren), 284 B.R. 681, 690 (Bankr. D. Minn.

2002).

"The intent element of § 523(a)(2)(A) does not require a finding of malevolence or personal ill-will; all it requires is a showing of an intent to induce the creditor to rely and act on the misrepresentations in question." Merchants Nat'l Bank v. Moen (In re Moen), 238 B.R. 785, 791 (B.A.P. 8th Cir. 1999) (quoting Moodie-Yannotti v. Swan (In re Swan), 156 B.R. 618, 623 n.6 (Bankr. D. Minn. 1993)). "Because direct proof of intent (i.e., the debtor's state of mind) is nearly impossible to obtain, the creditor may present evidence of the surrounding circumstances from which intent may be inferred." Id. (quoting Caspers v. Van Horne (In re Van Horne), 823 F.2d 1285, 1287 (8th Cir. 1987)). The intent to deceive will be inferred when the debtor makes a false representation and knows or should know that the statement will induce another to act. Id. (quoting Federal Trade Comm'n v. Duggan (In re Duggan), 169 B.R. 318, 324 (Bankr. E.D.N.Y. 1994)).

The plaintiffs contend that the debtor's execution of lien affidavits for each property attesting that the property was "free and clear of all liens, taxes, assessments, encumbrances and claims of every kind, nature and description whatsoever," and that "there have been no improvements, alterations, or repairs" to the property "involving work or materials for which the costs thereof remain unpaid" was a false representation because debtor knew that the plaintiffs remained unpaid at the time.

The debtor testified at trial that at the time he signed those lien affidavits, he knew he owed money to the plaintiffs. However, this admission of making a false statement on a lien affidavit does not prevent the debts from being discharged. Section 523(a)(2)(A) requires a finding that the debtor intentionally made the false representation *to deceive the creditor*. In this case, the false representations were made to the buyers, lenders, and title insurers of the properties. The representations in the lien affidavits were made well after the debtor hired the plaintiffs, so his statements therein could not have induced them to extend credit or provide labor and materials to be paid for later.

The plaintiffs both testified that they expected debtor to pay them prior to signing lien affidavits stating that he had, and relied on him to "take care of business" with them. The

parties had oral contracts for their work, and did not file mechanics' liens before the houses were sold. The plaintiffs relied on debtor to pay them for their work, but without evidence that he had no intention of doing so when he hired them, there can be no finding of nondischargeability under § 523(a)(2)(A).

C. § 523(a)(4)

Section 523(a)(4) of the Bankruptcy Code excepts from discharge any debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

"Acting in a fiduciary capacity" is limited in application to technical or express trusts, not to trusts that may be imposed because of the alleged act of wrongdoing from which the underlying indebtedness arose. See Barclays Am./Bus. Credit, Inc. v. Long (In re Long), 774 F.2d 875, 878-79 (8th Cir. 1985) (for purposes of § 523(a)(4) fraud or defalcation exception, fiduciary capacity must arise from express trust, not constructive trust or mere contractual relationship).

A merely contractual relationship, however, is less than what is required to establish the existence of a fiduciary relationship. Jafarpour v. Shahrokhi (In re Shahrokhi), 266 B.R. 702, 708 (B.A.P. 8th Cir. 2001) (citing Werner v. Hofmann, 5 F.3d 1170, 1172 (8th Cir. 1993) (per curiam)).

In this case, there has been no evidence of a fiduciary relationship.

D. § 523(a)(6)

The applicable law in this circuit has been explained as follows:

> Under section 523(a)(6), a debtor is not discharged from any debt for "willful and malicious injury" to another. For purposes of this section, the term willful means deliberate or intentional. See Kawaauhau v. Geiger, 523 U.S. 57, 61, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998) (§ 523(a)(6) requires deliberate or intentional injury); In re Long, 774 F.2d 875, 881 (8th Cir. 1985) (to meet willfulness component of § 523(a)(6), debtor's actions creating liability must have been "headstrong and knowing"). To

> qualify as "malicious," the debtor's actions must be "targeted at the creditor . . . at least in the sense that the conduct is certain or almost certain to cause financial harm." In re Long, 774 F.2d at 881.

Hobson Mould Works, Inc. v. Madsen (In re Madsen), 195 F.3d 988, 989 (8th Cir. 1999).

The application of § 523(a)(6) to a scenario where a debtor used funds belonging to one creditor to pay others was addressed recently by the Bankruptcy Court for the Northern District of Iowa in In re Heister, ___ B.R. ___, 2003 WL 685990 (Bankr. N.D. Iowa Feb. 27, 2003). In that case, the creditor, who owned antique tractors, allowed debtor to take several tractors on consignment to repair and sell them. The creditor was to receive a designated sale price, and the debtor could keep any amount over that. The arrangement worked for several years, but eventually the debtor ceased payments to the creditor when tractors were sold. After the debtor filed bankruptcy, the creditor filed an adversary proceeding to except the debt from discharge.

The court analyzed the § 523(a)(6) claim as follows:

> Plaintiff bears the burden of proof in showing that Debtor intended to injure him by not paying for the tractors. Grogan [v. Garner], 498 U.S. [279] at 286-87 [(1991)]. Debtor testified that when he did not remit the sale proceeds to Plaintiff, he was "robbing Peter to pay Paul." Debtor knew that withholding the sale proceeds would harm Plaintiff. Debtor withheld the proceeds in order to pay other creditors. The Court finds that Debtor acted willfully under § 523(a)(6).
>
> However, Plaintiff must also prove that Debtor acted maliciously in failing to pay Plaintiff. [In re] Scarborough, 171 F.3d [638] at 641 [(8th Cir. 1999)]. This is a difficult standard. Knowledge that legal rights are being violated is insufficient to establish malice, absent some additional aggravated circumstances. Long, 774 F.2d at 881. Proof of malice requires proof of a "heightened level of culpability . . . going beyond recklessness and beyond intentional violation of a security interest. Long, 774 F.2d at 881. Plaintiff must establish that the conduct

> precipitating the damage was targeted at the creditor. In re Alcorn, Adv. No. 00-9179-C, slip. op. at 3 (Bankr. N.D. Iowa Feb. 22, 2001).
>
> Debtor testified that in not paying Plaintiff, he was "robbing Peter to pay Paul." Withholding payment from one creditor to pay another or to pay living expenses, does not, in and of itself, establish malice. Jerdee, Adv. No. 99-9053-C, slip op. at 4 (Bankr. N.D. Iowa Apr. 10, 2000); see also In re Mausser, Adv. No. 98-01548-D, slip op. at 3 (Bankr. N.D. Iowa Feb. 3, 2000). Similarly, withholding payment is not malicious if it is done to allow the debtor to remain in business or to protect his financial interests. In re McGraw, Adv. No. 97-01428-W, slip op. at 9 (Bankr. N.D. Iowa Dec. 3, 1998).

Heister, 2003 WL 685990 at *6-7.

In the present case, there is no evidence of malice. The debtor testified that he had many bills to pay and lacked sufficient income to pay them all. As a result, he left some subcontractors unpaid. Under § 523(a)(6), deciding which subcontractors to pay and which not to pay does not rise to the level of “targeting” those creditors for the purpose of causing them financial harm.

III. Conclusion

The debts are dischargeable. Separate judgment will be entered.

DATED: March 31, 2003

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
*Todd Weidemann
Howard Duncan
U.S. Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

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Defendant.	)	

JUDGMENT

Trial was held in Omaha, Nebraska, on January 27, 2003, on the complaint to determine dischargeability. Howard Duncan appeared for the debtor, and Todd Weidemann appeared for the plaintiffs.

IT IS ORDERED: For the reasons set forth in the Memorandum of today's date, judgment is hereby entered in favor of the defendant. The debts which are the subject matter of this adversary proceeding are dischargeable.

DATED: March 31, 2003

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

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